92-1263

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EARLINE CHABERT,

Petitioner,

versus

THE SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On November 3, 1982, Earline Chabert was left a widow when her husband was killed in an automobile accident while employed by claimant, Southern Pacific Transportation Company. The vehicle he was driving was forced off the Greater New Orleans Bridge and he plunged to his death. Pursuant to a collective bargaining agreement, Southern Pacific was required to pay a $132,000.00 death benefit and in connection therewith, Mrs. Chabert signed a subrogation agreement.

The widow filed a negligence action against various parties on her behalf and on behalf of her children. This suit was subsequently settled without prejudice to the rights of SOPAC to pursue its subrogated rights against the alleged tort-feasors. After settlement, plaintiff sued the widow, Mrs. Chabert, for a return of the $132,000.00 death benefit pursuant to the subrogation agreement claiming that the amount received by the widow was full compensation of her claim for the wrongful death of her husband. The District Court found that Mrs. Chabert had been fully compensated by her settlement and was required to return the death benefit paid to her. The decision was affirmed by the Court of Appeals. Questions presented are:

1) Did the Court fail to properly apply Louisiana law in determining full compensation of a surviving spouse in a wrongful death claim;

2) Did the Court err in holding that the only element of a wrongful death action is loss of support; and,

QUESTIONS PRESENTED – Continued

3) Did the Court err in not assigning any value to loss of love and affection, mental anguish and loss of consortium, in determining whether the widow, Mrs. Chabert, was fully compensated.

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Earline Chabert, requested a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on September 30, 1992, which affirmed a judgment of the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 12-27) is reported at 973 F.2d 441. The judgment and reasons for

judgment of the District Court (App. 1-11) are unreported.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 30, 1992. App. 12-27. A timely petition for rehearing was denied on October 29, 1992. App. 28-29. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Louisiana's Civil Code Article 2315 sets forth the following:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

STATEMENT OF CASE

On November 3, 1982, Earline Chabert's husband, Thomas, was killed in an automobile accident when his car was run off the Greater New Orleans Bridge and plunged one hundred sixty feet to his death. At the time

of his death, Thomas Chabert was employed and acting within the course and scope of his employment with Southern Pacific Transportation Co. ("SOPAC").

In accordance with the national collective bargaining agreement between SOPAC and Thomas Chabert's union, SOPAC paid Earline Chabert a $132,000.00 death benefit. As a condition to receiving this death benefit, Earline Chabert was required to sign an agreement which subrogated SOPAC to a right of recovery against any party who may be responsible.

Subsequently, Earline Chabert filed a wrongful death suit, individually and on behalf of her minor children, against various defendants for the wrongful death of her husband. SOPAC chose not to file a suit or otherwise intervene in the suit filed by Mrs. Chabert. After lengthy discovery and expert reports, and immediately before trial, Earline Chabert settled on her behalf as well as her two minor children. Out of the settlement, Mrs. Chabert received a net settlement of $340,035.00. The settlement did not prejudice the right of SOPAC to pursue recovery against the alleged tort-feasors for its subrogated portion of Mrs. Chabert's claim.

After the settlement was reached, SOPAC filed suit in the United States District Court for the Eastern District of Louisiana, with jurisdiction based on diversity of parties, 28 U.S.C. §1332, seeking reimbursement of the $132,000.00 death benefit from the widow, Earline Chabert.

On December 13, 1990, United States District Court, the Honorable Frederick Heebe presiding, entered judgment against the defendant in the amount of $132,000.00

on the basis that the widow, Earline Chabert, as a result of the settlement, had been fully compensated for the wrongful death of her husband. Louisiana law provides that only when a subrogor has been *fully* compensated by a settlement with the tort-feasor is a subrogee entitled to reimbursement from the subrogor's settlement.

On appeal, the United States Court of Appeals for the Fifth Circuit was required to rule on the finding of Earline Chabert's full compensation for the wrongful death of her husband. On September 30, 1992 the Fifth Circuit Court of Appeals, considering and assigning value to only one element of damages allowed by Louisiana law for wrongful deaths, ruled that the net settlement received by Earline Chabert fully compensated her for the wrongful death of her husband and thus she was required to pay SOPAC the death benefit she previously received. Because the Fifth Circuit Court of Appeals failed to take into consideration all elements of damages provided by law, a petition for rehearing was timely filed on Mrs. Chabert's behalf in order to give the Court of Appeals the opportunity to correct this obvious error of law. On October 29, 1992, the Fifth Circuit Court of Appeals denied Mrs. Chabert's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve the lower court's error in failing to properly apply Louisiana law as constitutionally required. In failing to recognize all elements of damages in a wrongful death action and in limiting the inquiry into only loss of support suffered by

the widow as a result of Thomas Chabert's death, the Court of Appeals was clearly in error in its duty to properly apply state law. This writ should be summarily granted so that a proper application of state law may be made remanding this case to the Court of Appeals directing it to address and correctly apply state law.

I. THE LOWER COURT WAS IN ERROR IN FAILING TO RECOGNIZE THAT LOUISIANA LAW ALLOWS DAMAGES FOR LOSS OF CONSORTIUM, SERVICE, LOVE, AFFECTION AND SOCIETY, IN WRONGFUL DEATH ACTIONS.

The Louisiana Civil Code, in determining liability for acts causing damages, states the following:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

Louisiana Civil Code, Art. 2315.

It is well settled under Louisiana law that the elements of damages for wrongful death claims are loss of love and affection, loss of services, support and society, mental pain, suffering and distress, medical expenses and funeral expenses. *Simmons v. Hartford Ins. Co.*, 786 F.Supp. 574, 581 (E.D.La. 1992); *Pierre v. Lallie Kemp Charity Hosp.*, 515 So.2d 614 (La. App. 1st Cir.); *writ den.*, 515 So.2d 1111 (La. 1987); *Cannon v. Cavalier Corp.*, 572 So.2d 299 (La. App. 2nd Cir. 1990); *Prince v. Mattalino*, 583 So.2d 541 (La.

App. 3rd Cir. 1991); *Levet v. Calais & Sons, Inc.*, 514 So.2d 153 (La. App. 5th Cir. 1987). Furthermore, the United States Supreme Court has acknowledged that recovery for loss of support has been universally recognized in wrongful death actions, and includes all the financial contributions that the decedent would have made to his dependents had he lived. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 584-85 (1974).

Additionally, the Supreme Court has recognized that a clear majority of states, including Louisiana, permit recovery for loss of society. *Sea-Land*, 414 U.S. at 587 (*see*: Footnote 21). Thus, Louisiana courts, as well as the United States Supreme Court, recognize that to begin to be fully compensated in a wrongful death action, a widow shall be compensated for far more than just the loss of support that the decedent would have generated had he lived; but the surviving spouse is to be awarded for the losses of society suffered as well.

The Fifth Circuit Court of Appeals correctly determined that "SOPAC may not recoup its prior payments to Chabert unless Chabert has received full compensation for her loss". *Southern Pacific Trans. Co. v. Chabert*, 973 F.2d 441, 447 (5th Cir. 1992). To determine whether Mrs. Chabert was fully compensated by her receipt of $340,035.00, a court should take into consideration all elements of damages that Louisiana's courts and the United States Supreme Court have recognized.

II. FEDERAL COURTS SITTING IN DIVERSITY ARE CONSTITUTIONALLY REQUIRED TO APPLY APPLICABLE STATE LAWS.

For over half a century, federal courts sitting in diversity have been required, except in matters governed by the Federal Constitution or by Acts of Congress, to apply the law of the state to any case before it. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The intent of the *Erie* decision was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, as in the case *sub judice*, the outcome of the litigation in the federal court should be substantially the same, as it would be if tried in a state court. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945), *reh'g den.*, 326 U.S. 806; *Felder v. Casey*, 487 U.S. 131, 151 (1988) (quoting *Guaranty Trust Co.*). The *Felder* court mandated that federal courts are constitutionally obligated to apply state law to state claims. *Felder*, 487 U.S. at 151; *see: Erie*, 304 U.S. at 78-79. The central theme of the *Erie* decision was that if two cases arose from the same accident, with one reaching state court and one decided in a federal court a block away, the results should not be substantially different. *Guaranty Trust*, 326 U.S. at 109.

Thus, it is abundantly clear that the lower courts are constitutionally required to correctly apply Louisiana law in determining whether the widow was fully compensated. The Court of Appeals was clearly in error when it recognized only one of the elements of a wrongful death action, loss of support, in determining whether Mrs. Chabert was fully compensated by her net settlement for the death of her husband. *Chabert*, 973 F.2d at 447. The

effect of this decision is directly in conflict with *Erie* and its progeny, the decision in federal court is substantially different than had it been decided in state court.

The Fifth Circuit Court of Appeals, in determining whether Earline Chabert was fully compensated by her net award of $340,035.00, took into consideration only the lowest post-tax estimate for loss of support given by the defendant's economist to determine Mrs. Chabert's total compensation,

> [t]his figure [$340,035 settlement] is within the damage range estimated by one of the economists who testified . . . The lowest post-tax estimate is $333,281. The district court appropriately could conclude, then, the $340,035 settlement fully compensated Chabert.

Chabert, 973 F.2d at 447. The court failed to recognize and properly apply Louisiana law and, in effect, without addressing the issue, determined that Mrs. Chabert has not suffered any non-pecuniary damages that are recognized by Louisiana law such as loss of love and affection, mental anguish and loss of consortium. By using only the past and future loss of support in determining full compensation, the court has in effect told Mrs. Chabert that she has not suffered any loss of love and affection, loss of services and society, mental pain, suffering and distress, or loss of support. When your husband and father of your two children, ages 8 and 18 months, dies as tragically as Thomas Chabert did, not even the most cold and callous could say that the widow has not suffered from any loss of love or affection, loss of services, mental pain, suffering and distress. The court's use of only the economic loss has told Mrs. Chabert that her husband and high school sweetheart was merely her employee and her

damages are limited to only the loss of the income be brought into the household.

This is not a battle of quantum studies, but to guide this Court in determining whether Earline Chabert was in fact fully compensated by the award, this Court need only examine the Louisiana Supreme Court's opinion in *Ingram v. Caterpillar Machinery Corp.*, 535 So.2d 723, 731 (La. 1988). *reh'g den.*, when Louisiana's highest court concluded that, under Louisiana law, an award between $200,000.00 and $300,000.00 for non-pecuniary damages to a widow was not an abuse of discretion.

Clearly, the Court of Appeals failed to properly apply state law as constitutionally required. *Felder,* 487 U.S. at 151. If the court had recognized the elements of a wrongful death action and then concluded the widow Chabert had been fully compensated, there would be no argument. However, this is not the case. The Court of Appeals ignored the applicable state law and jurisprudence when it required the widow to return the death benefits paid to her because of her husband's death based solely on an improper determination of full compensation. Thus, it is imperative that this Court correct this grievous mistake and grant the writs that are prayed for.

CONCLUSION

The Petition for Writ of Certiorari should be summarily granted remanding the matter to the United States Court of Appeals for the Fifth Circuit ordering that it address and properly apply Louisiana law.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOUTHERN PACIFIC TRANSPORTATION CO.	CIVIL ACTION
VERSUS	NO. 88-1019
EARLINE CHABERT	SECTION: "B"

JUDGMENT

(Filed Dec. 13, 1990)

Considering the written Order of the Court on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment on the principal claim in favor of plaintiff, Southern Pacific Transportation Co., and against defendant, Earline Chabert, in the amount of $132,000.00, together with legal interest and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment on the counterclaim in favor of defendant, Earline Chabert, and against plaintiff, Southern Pacific Transportation Co., in the amount of $19,425.06, together with legal interest.

New Orleans, Louisiana, the 13th day of December, 1990.

/s/ Frederick Heebe
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOUTHERN PACIFIC TRANSPORTATION COMPANY	CIVIL ACTION
VERSUS	NO. 88-1019
EARLINE CHABERT	SECTION: "B"(4)

OPINION

(Filed Nov. 30, 1990)

This controversy arises out of a dispute between plaintiff, Southern Pacific Transportation Company (hereinafter referred to as "SoPac"), and defendant, Earline Chabert (hereinafter referred to as "Mrs. Chabert"), regarding the rights of the former to recover from the latter certain monies paid pursuant to an agreement between SoPac and the union to which Mrs. Chabert's husband belonged. SoPac brought suit pursuant to this Court's diversity of citizenship jurisdiction, 28 U.S.C. §1332. The matter proceeded to trial by the court on July 12, 1990. The trial was completed on July 17, 1990.

This Court, having heard the testimony at trial and having considered the evidence and proposed findings of fact and conclusions of law submitted by the plaintiff and defendant, now makes the following findings of fact and conclusions of law in accordance with Rule 50(a) of the Federal Rules of Civil Procedure. Accordingly,

IT IS THE ORDER OF THE COURT that judgment be entered in favor of plaintiff, Southern Pacific Transportation Company, and against defendant, Earline Chabert, in

the sum of $112,574.94, plus legal interest from March 9, 1988.

FINDINGS OF FACT

Plaintiff, Southern Pacific Transportation Company, is a corporation organized under the laws of Delaware, with its principal place of business in California, authorized to do and doing business in the State of Louisiana.

Defendant, Earline D. Chabert, is a resident of and domiciled in the State of Louisiana.

On or about November 3, 1982, Thomas J. Chabert, husband of the defendant, was killed in an accident on the Greater New Orleans Bridge.

On February 16, 1983, SoPac paid a death benefit in the amount of $132,000 to Mrs. Chabert, pursuant to Article V of the National Agreement (hereinafter referred to as the "national agreement") which existed between SoPac and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as "the union").

The national agreement provides as follows:

> The carrier shall be subrogated to any right of recovery an employee or his personal representative may have against any party for loss to the extent that the carrier has made payments pursuant to this article.

In accordance with Article V of the national agreement and contemporaneous with the payment of $132,000, SoPac and Mrs. Chabert executed an agreement

which provided that SoPac was subrogated to Chabert's rights. The subrogation agreement provides as follows:

> In consideration of the payment of $132,000 as aforementioned both parties agree to be governed by all of the terms, conditions, and provisions of said off-track vehicle agreement, including, but not limited to, the off-set and subrogation provision thereof. . . .

On May 27, 1983, Mrs. Chabert filed a petition for damages against various defendants in the 24th Judicial District Court for the Parish of Jefferson, seeking damages suffered by herself and her two minor children arising out of the death of her husband (hereinafter referred to as "the Jefferson Parish litigation").

SoPac was not named as a party in the Jefferson Parish litigation.

On several occasions during the course of the Jefferson Parish litigation, Mrs. Chabert's attorney, Mr. Thomas L. Gaudry, Jr., contacted counsel for SoPac, Mr. Raymond Salassi, in an attempt to persuade SoPac either to contribute to the cost of litigating the case, or to reach an agreement as to how the monies recovered, if any, would be dispersed.

SoPac repeatedly refused Mr. Gaudry's proposals to modify in any way the agreement which had been reached by SoPac and Mrs. Chabert on February 16, 1983.

At some time during the course of the Jefferson Parish litigation, Mr. Gaudry and Mr. Salassi reached an agreement that in all likelihood Mrs. Chabert would recover more money if the $132,000 payment made by

SoPac were not disclosed to the defendants and if SoPac were not joined as a party plaintiff.

In early July 1987, Mr. Salassi learned from one of the defendants in the Jefferson Parish litigation that the action was near settlement.

On or about July 7, 1987, Mr. Salassi and Mr. Gaudry had a telephone conversation in which the latter represented that no meaningful settlement negotiations had taken place. Mr. Gaudry again attempted to obtain SoPac's agreement to reduce its $132,000 claim by contributing to the costs and attorney's fees incurred in recovering same.

On or about July 13, 1987, Mr. Richard Tyler, on behalf of SoPac, went to the 24th Judicial District Court where Mrs. Chabert's lawsuit was scheduled to commence that date.

Prior to the commencement of the proceedings, Mr. Gaudry and Mr. Tyler had a conversation in which the former told the latter that Mrs. Chabert's action had been settled with all but two defendants and requested that SoPac cooperate by contributing toward the costs and attorney's fees of the lawsuit. Mr. Gaudry further threatened a suit under the Federal Employers Liability Act if SoPac did not agree to contribute toward such costs and fees.

The claims asserted in the Jefferson Parish litigation were compromised and settled inconsideration of the payment of $825,000 to Mrs. Chabert, individually, and as tutrix and administratrix of the estates of her two minor children.

As part of the settlement, Mrs. Chabert agreed to indemnify the tortfeasors against any claims of SoPac.

Mrs. Chabert and her attorney, Mr. Gaudry, recommended the settlement to the court, stating that the "compromise settlement offered is entirely fair and it should be accepted." (Document No. 50)

On Mrs. Chabert's recommendation, the settlement was approved by the court on behalf of her minor children.

The settlement of Mrs. Chabert's lawsuit was read into the record, and Mr. Gaudry acknowledged SoPac's lien claim and stated, "we are going to held harmless and indemnify all of the defendants as to the Southern Pacific lien." (Document No. 50)

Upon hearing of the settlement, Mr. Salassi contacted Mr.. Gaudry concerning SoPack's subrogation rights. Mr. Gaudry stated that, unless SoPac agreed to pay the sum of $50,000 towards attorney's fees and costs, it was his intention to deposit the $132,000 into the registry of the court and argue that SoPac was obligated to fund some of the attorney's fees and costs associated with recovering the money.

Mrs. Chabert was aware that SoPac was claiming the right to the first $132,000 she received out of any settlement or judgment and that SoPac might institute action against her.

On September 14, 1987, Mr. Gaudry wrote a letter to Mrs. Chabert regarding the $132,000 that she had received from SoPac. In that letter Mr. Gaudry reaffirmed that the subrogation signed on February 16, 1983 might

still be enforceable against her, in whole or in part, and that she might be liable for the entire $132,000, for court costs, for interest, and for other associated expenses in the event that suit be brought.

On or about September 18, 1987, Mrs. Chabert was informed that the law firm of Windhorst, Pastorek & Gaudry would defend her at no charge should SoPac institute suit against her.

In the latter months of 1987, Mr. Salassi made several attempts to contact Mr. Gaudry concerning the latter's representation that he intended to place $132,000 in the registry of the court.

Mr. Gaudry never placed the funds in the registry of the court in connection with the Jefferson Parish litigation.

Mrs. Chabert has not paid the $132,000 nor any part thereof to SoPac since the funding of the Jefferson Parish litigation on or about August 25, 1987.

The settlement agreement reached by Mrs. Chabert with the defendants in the Jefferson Parish litigation was a fair one. The Court finds that $825,000 fully compensated Mrs. Chabert and her children for their losses.

As a result of Mrs. Chabert's full recovery, the Court finds that SoPac is entitled to recover from Mrs. Chabert the $132,000 previously-paid death benefit. However, SoPac must contribute its proportionate share of Mrs. Chabert's costs of recovery.

Mr. Gaudry's firm and Mrs. Chabert had a 40% contingency fee arrangement in the Jefferson Parish litigation. However, according to Mr. Gaudry's records, had

Mr. Gaudry billed Mrs. Chabert on an hourly basis for the attorney's fees, she would have owed $91,406.65. (Plaintiff's Exhibit No.30) The Court finds $91,406.65 to be a reasonable figure for Mrs. Chabert's attorney's fees, and the Court will use this amount in calculating Mrs. Chabert's litigation expenses.

$30,000 in costs were also incurred in the Jefferson Parish litigation.

Mrs. Chabert's total cost of recovery in the Jefferson Parish litigation, therefore, is $121,406.65.

Because SoPac is entitled to be reimbursed $132,000 out of the total recovery of $825,000, SoPac's percentage share of the costs is $132,000/$825,000 or 16%.

Thus, SoPac's reimbursement must be reduced by 16% of the total cost of recovery, $121,406.65, or $19,425.06.

The Court finds that SoPac is entitled to recover $112,574.94 ($132,000 less $19,425.06).

CONCLUSIONS OF LAW

This Court has jurisdiction in the instant case pursuant to 28 U.S.C. §1332.

The agreement executed February 16, 1983 between SoPac and Mrs. Chabert was one of conventional subrogation. La. Civ. Code Art. 1828.

Under the terms of the agreement, SoPac was subrogated to Mrs. Chabert's right of recovery up to $132,000. La. Civ. Code Art. 1825.

Although the agreement used the term "subrogation," the object of the agreement was to reimburse SoPac for the previously paid death benefit of $132,000. Smith v. Manville Forest Products Corp., 521 So.2d 772, 775 (La. App. 2d Cir. 1988).

"Subrogation and reimbursement are not synonymous terms, but the object of conventional subrogation is reimbursement." *Id.*

However, under a conventional subrogation agreement, an insurer may not directly recover compensation payments from the insured unless the insured has been fully compensated for her damages. Southern Farm Bureau Casualty Insurance Co. v. Sonnier, 406 So.2d 178, 181 (La. 1981).

Likewise, where an insured has been fully compensated for her injuries, the insurer may directly recover from the insured previously paid compensation payments. *Smith,* 521 So.2d at 777; *see also,* Audubon Insurance Co. v. Farr, 453 So.2d 232, 235 (La. 1984).

The rationale is that the insured should be compensated for her damages but should not be entitled to multiple recovery. Wallace v. Aetna Life and Casualty Insurance Co., 499 So.2d 577, 580 (La. App. 2d Cir. 1986), *citing* Liberty Mutual Insurance Co. v. Weinberger, 329 So.2d 254, 256 (La. App. 4th Cir. 1976).

Thus, SoPac may recover directly from Mrs. Chabert provided Mrs. Chabert and her children have been fully compensated for their damages. *Smith,* 521 So.2d at 777.

Because the $825,000 settlement agreement provided full compensation to Mrs. Chabert and her children,

SoPac is entitled to recoup from Mrs. Chabert the previously paid death benefit of $132,000. *Id.*

SoPac's recovery, however, must be reduced by its share of Mrs. Chabert's litigation expenses. Moody v. Arabie, 498 So.2d 1081, 1085 (La. 1986).

Upon payment of the $132,000 death benefit, SoPac became a co-owner of Mrs. Chabert's claim against the third party tortfeasors. *Id.*

Co-owners must proportionately share "the necessary and reasonable costs of recovery." *Id.* at 1086.

Costs of recovery in the Jefferson Parish litigation include reasonable attorney's fees. *Id.* Reasonable attorney's fees are determined under the standard set by the Model Rules of Professional Responsibility. *Id.* A contingency fee arrangement is a factor to be considered in determining reasonable attorney's fees, but the Court "is not bound" by such an arrangement. Major v. Cotton's, Inc., 551 So.2d 57, 59 (La. App. 1st Cir. 1989), *citing Moody,* 498 So.2d at 1086.

SoPac is also entitled to legal interest from the date of judicial demand, March 9, 1988, until paid. Mini Togs Products, Inc. v. Wallace, 513 So.2d 867, 875 (La. App. 2d Cir.), *writ denied,* 515 So.2d 451 (La. 1987).

Accordingly,

IT IS THE ORDER OF THE COURT that judgment be entered in favor of Southern Pacific Transportation Company, and against Earline Chabert, in the sum of $112,574.94, plus legal interest from the date of judicial demand, March 9, 1988.

New Orleans, Louisiana, this 29th day of November 1990.

/s/ Frederick Heebe
UNITED STATES DISTRICT JUDGE

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellee,

v.

Earline CHABERT, Defendant-Appellant.

No. 91-3256.

United States Court of Appeals,
Fifth Circuit.

Sept. 30, 1992.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, SMITH, Circuit Judge, and FITZWATER,* District Judge.

POLITZ, Chief Judge:

Earline Chabert appeals a judgment against her for $132,000 in favor of Southern Pacific Transportation Company (SOPAC). She also appeals the amount awarded on her counterclaim for attorney's fees and costs. For the reasons assigned, we affirm

Background

On November 3, 1982, Chabert's husband, Thomas Chabert, was killed in an automobile accident on the Greater New Orleans Bridge. At the time of his death Thomas Chabert was acting within the scope of his employment with SOPAC. On February 16, 1983, SOPAC paid a $132,000 death benefit to Chabert under the

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* District Judge of the Northern District of Texas, sitting by designation.

National Agreement between SOPAC and the union of which her husband was a member. Contemporaneous with the payment, SOPAC and Chabert signed a contract which provided:

> In consideration of the payment of $132,000 as aforementioned both parties agree to be governed by . . . the subrogration provision. . . .
>
> *Subrogation:* The carrier shall be subrogated to any right of recovery an employee or his personal representative may have against any party for loss to the extent that the carrier has made payments pursuant to this Article.

Chabert filed a wrongful death suit against various defendants which she settled, individually and on behalf of her two minor children, for $825,000. In the settlement she released all defendants from any claim arising out of her husband's accident and death. SOPAC did not participate in the suit or settlement. It filed the instant suit seeking reimbursement of the $132,000 it had paid to Chabert. Chabert counterclaimed for the attorney's fees and costs she had incurred in securing the $825,000 settlement.

After a bench trial, the district court concluded that the $825,000 payment fully compensated Chabert for her losses. The court also found that the agreement between her and SOPAC was a conventional subrogation and that Chabert and her counsel were fully aware of SOPAC's subrogation claim when they settled for $825,000 and released the tortfeasors. The court awarded Chabert $19,425.06 on her counterclaim for expenses incurred in obtaining the settlement. The offset was calculated based on the court's estimate of the amount of the legal fees

attributable to the settlement, an hourly-based total of $121,406.65. This expense item was multiplied by 16%, considered SOPAC's percentage share of the recovery. Chabert timely appealed the SOPAC award and the amount awarded on her counterclaim.

Analysis

Findings of fact made pursuant to a bench trial are subject to the clearly erroneous standard of review.[1] Legal conclusions are subject to plenary review. The parties agree that Louisiana law controls the instant dispute.

1. *Subrogation*

Subsequent to the SOPAC/Chabert agreement the articles of the Louisiana Civil Code pertaining to subrogation were extensively amended by La. Acts 1984, No. 331, Sec. 1, effective January 1, 1985. In the absence of legislative expression to the contrary, substantive laws are not given retroactive effect.[2] With one exception discussed below, the pre-revision articles in effect at the time of SOPAC's payment to Chabert control the instant dispute.[3]

Under Louisiana law, subrogation may be either conventional or legal.[4] Conventional subrogation occurs

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[1] Fed.R.Civ.P. 52(a).

[2] La.Civ.Code art. 6.

[3] *Anthony v. New Orleans Public Service, Inc.*, 480 So.2d 440 (La.App.1985), *cert. denied*, 482 So.2d 628 (La.1986).

[4] La.Civ.Code art. 2159 (West 1952) (repealed 1984 La.Acts 331, Sec. 1).

when the creditor or obligee, receiving payment from a third person, subrogates his rights, actions, privileges, and mortgages against the debtor or obligor; this subrogation must be express and contemporaneous with the payment.[5] A conventional subrogation may also be partial if the payment to an obligee represents only part of the total debt owed.[6] In a partial subrogation the debt is divided between the subrogor and the subrogee, making them either joint or several obligees.[7] Historically, Louisiana law has given a preference to the original creditor or subrogor over the partial subrogee.[8] This preference derives from the legal presumption that one does not act against ones own interest when subrogating another to one's rights.[9]

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[5] La.Civ.Code art. 2160 (repealed).

[6] *Southern Farm Bureau Casualty Insurance Co. v. Sonnier,* 406 So.2d 178 (La.1981); *see also* Saul Litvinoff, *Subrogation,* 50 La. L.Rev. 1143, 1148-49 (1990).

[7] *Sonnier,* 406 So.2d at 180 (citing *Cox v. W.M. Heroman & Co.*, 298 So.2d 848 (La.1974)).

[8] *Sonnier,* 406 So.2d at 181; Litvinoff, *supra,* at 1148; Marcel Planiol, 2 *Treatise on the Civil Law* No. 515, p. 287 (La.Law Inst. trans. 11th ed. 1939); C. Aubry & C. Rau, IV *Cours de Droit Civil Francais* § 321, pp. 208-9 (La. Law Inst. trans. 6th ed. 1965).

[9] The continued force of this traditional adage, *"nemo contra se subrogasse censetur,"* was questioned by one scholar analyzing the 1984 revisions to the subrogation articles. *See* Alain A. Levasseur, *Louisiana Law of Obligations in General* 176 (1988) (discussing La.Civ.Code art. 1827 and comment (d)). Despite this possible trend in the modern law, *Sonnier,* a pre-revision decision relying upon the maxim, has been followed by post-revision cases. *See Smith v. Manville Forest Products Corp.*, 521 So.2d 772 (La.App.), *cert. denied,* 522 So.2d 570 (La.1988) and

The *Sonnier* court applied this maxim to a conventional, partial subrogation between an insurer and its insured. The court held that an insurer cannot recover funds advanced to its insured unless the insured has been fully compensated for the loss.[10] SOPAC makes the converse argument that if the subrogor, Chabert, has been fully compensated by her $825,000 settlement, then SOPAC, the partial subrogee, can recoup its entire $132,000 payment. We find this argument consistent with *Sonnier* and its progency. In *Smith v. Manville Forest Products Corp.*,[11] the court held that if an employee who received medical benefits was subsequently fully compensated, then the employer who had paid the benefits could recoup the payment pursuant to a conventional subrogation agreement. Similarly, in *Provident Life and Accident Insurance Co. v. Turner*,[12] the court stated that pursuant to Sonnier, an insurer could collect the amount of a subrogation claim from insureds who had recovered the full amount of damages from the tortfeasors. The *Turner* court also relied upon the plurality opinion in *Audubon Insurance Co. v. Farr.*[13] Because the *Audubon* insured had breached a subrogation agreement by settling with the tortfeasors without the insurer's knowledge or consent, the insurer was awarded judgment in

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Provident Life and Accident Insurance Co. v. Turner, 582 So.2d 250 (La.App.1991).

[10] 406 So.2d at 180-181.

[11] 521 So.2d 772 (La.App.), *cert. denied*, 522 So.2d 570 (La.1988).

[12] 582 So.2d 250 (La.App.1991).

[13] 453 So.2d 232 (La. 1984).

the amount it had paid as a partial, conventional subrogation.[14]

The *Audubon* plurality confirmed the rule that an insured holds excess recovery in trust for the insurer.[15] This rule, rooted in insurance law, was explained thusly:

> When the insured recovers from the tortfeasor an amount which, with the amount already received from his insurer, exceeds the loss actually sustained by him, he holds the excess as trustee for his insurer for whom it belongs[.][16]

Whether SOPAC is considered a partial subrogee, as described in *Sonnier* and the civilian tradition, or is analogized to an insurer, the result is the same: if Chabert has received full compensation, then she must reimburse SOPAC. Chabert argues that the *Sonnier* and *Audubon* rationales only apply to insurance contracts. *Harrison,* for example, is an early case cited for the proposition that an insured who receives a double recovery holds the excess in trust for the insurer. The *Harrison* court derived this rule from general treaties on insurance law and one Louisiana case.[17] The *Sonnier* analysis, however, is based on

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[14] *See also Wallace v. Aetna Life and Casualty Insurance Co.,* 499 So.2d 577 (La.App. 1986) (reaching the same result pursuant to a reimbursement agreement).

[15] *See Audubon,* 453 So.2d at 235 (plurality) (following *Pennsylvania Fire Insurance Co. v. Harrison,* 94 So.2d 92 (La.App. 1957)); *see also Voss v. Mike & Tony's Steak House,* 230 So.2d 470 (La.App. 1969) (following Harrison); *Great Falls Insurance Co. v. Jordan,* 454 So.2d 301 (La.App. 1984) (following *Audubon* plurality).

[16] *Harrison,* 94 So.2d at 94.

[17] *See* 94 So.2d at 94.

traditional civilian doctrines; thus we are not persuaded that *Sonnier* and its progeny are limited to insurance policy subrogation clauses.[18] *Harrison's* trustee theory has its roots in insurance law, but the *Harrison* rule appears intertwined with the civilian authorities[19] and, in any event, is consistent with the *Sonnier* line of cases.

Chabert claims that *State National Fire Insurance Co. v. Sykes*[20], is the controlling authority in the instant dispute. Chabert argues that SOPAC's subrogation agreement gives it a claim against the various tortfeasors with whom Chabert settled. Under this theory, these tortfeasors would then bring an indemnity action against Chabert for her violation of the settlement and release agreement. We do not find that the *Sykes* holding mandates this result. In *Sykes*, an insurer sued the tortfeasors who had injured its insureds, and then amended the complaint to state a cause of action against the insureds themselves. The issue on appeal was whether the insurer could maintain its action against the tortfeasors. The court found that it could, and that the tortfeasors in turn could bring an indemnity action against the insureds. We are not persuaded that *Sykes* is controlling; it does not address the issue at bar. Whether a cause of action existed against the insureds was not before the *Sykes* court and apparently

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[18] *See* 406 So.2d at 181 (discussing Pothier and citing Planiol and Aubry and Rau).

[19] For example, the *Turner* court grouped *Sonnier* and *Audubon* together; the *Audubon* plurality confirmed the continued validity of *Harrison*.

[20] 527 So.2d 589 (La.App. 1988).

was left unresolved after the insurer's success in recovering payment from the tortfeasors.

Chabert also argues that the terms of her agreement with SOPAC distinguish this case from the cases which allow subrogees to recoup payments directly from the subrogor. The agreement provided that SOPAC was "subrogated to any right of recovery an employee or his personal representative may have against any party for loss to the extent that the carrier has made payments pursuant to this Article." This language falls short of the reimbursement power granted in *Smith* and *Wallace*.[21] The *Sonnier* insurance clause, however, was similar to the clause signed by Chabert.[22] The *Turner* opinion did not contain a description of the terms of the subrogation agreement. We acknowledge that a Louisiana court might draw the distinction relied upon by Chabert.[23] This, however, does not appear to be the jurisprudential trend. Indeed *Turner*, the most recent authority, did not discuss the terms of the clause and interpreted *Sonnier* in support of the subrogation right. As the *Sonnier* clause is indistinguishable, we are impelled to conclude that a Louisiana court faced with this issue would resolve that SOPAC should recoup the advanced funds.

A second means by which a subrogation could be effected is by operation of law. A legal subrogation arises

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[21] *See Smith*, 521 So.2d at 774; *Wallace*, 499 So.2d at 579.

[22] *See* 406 So.2d at 180.

[23] *See e.g., Brister v. Blue Cross & Blue Shield of Florida, Inc.*, 562 So.2d 1040 (La.App. 1990) (discussing *Smith* and *Sonnier* with the assumption these cases relied on the double recovery provisions of insurance policies).

"[f]or the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it."[24] Under the terms of SOPAC's contract with the Union, SOPAC paid Chabert $132,000 as a death benefit and thereby became *legally* subrogated to Chabert's claim for up to $132,000.[25] Traditionally, however, legal subrogation vests the subrogee with a right against the debtors, not the subrogor.[26]

In addition, we find that an added phrase in article 1829(3) is a remedial and interpretative change clarifying

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[24] La.Civ.Code art. 2161 (repealed). The code as amended in 1984 by Act 331, Sec. 1, is more restrictive in that it requires that the subrogee have recourse against the others with whom it owes a debt as a result of the payment. *See* La.Civ.Code art. 1829(3); *Illinois Central Gulf Railroad Co. v. Deaton, Inc.*, 581 So.2d 714 (La.App.), *cert. denied*, 588 So.2d 1117 (La. 1991); *Johnson v. Deselle*, 596 So.2d 261 (La.App.), *cert. denied*, 600 So.2d 638 (La. 1992). The altered language was an intended change from "traditional law." *See* Litvinoff, *supra*, 50 La.L.Rev. at 1171. Accordingly, this substantive change does not have retroactive application.

[25] *See Aetna Insurance Co. v. Naquin*, 488 So.2d 950 (La. 1986) (interpreting La.Civ.Code art. 2161(3)); *see also Sykes* (interpreting *Naquin* and the present article 1829(3)); *Turner*.

[26] *See e.g.*, Marcel Planiol, 2 *Treatise on the Civil Law* No. 510, p. 285 (La.Law Inst. trans. 11th ed. 1939) (the subrogee bound with others has an action against "all the debtors"); Saul Litvinoff, *The Law of Obligation in the Louisiana Jurisprudence* 624 (1985) (explaining that the subrogee is entitled to assert any rights and actions "of the former creditor"); C. Aubry and C. Rau, IV *Cours de Droit Civil Francais* § 321, p. 204 (La.Law Inst. trans. 6th ed. 1965) (the subrogor is omitted from the list of persons against whom the subrogee may enforce a legal subrogation).

an ambiguity in article 2161(3). This portion of article 1829(3) therefore has retroactive application.[27] Former article 2161(3) explains that subrogation takes place of right "[f]or the benefit of him who, being bound with others, or for others, for the payment of the debt, *had an interest in discharging it.*" (Emphasis supplied.) The present article 1829(3) provides that subrogation takes place by operation of law "[i]n favor of an obligor who pays a debt he owes with others or for others and who has recourse *against those others* as a result of the payment[.]" (Emphasis supplied.) The added specification that the legal subrogee has recourse against the other obligors defines the recourse, thereby excluding an action against the original obligee or subrogor. Another civilian source for the new statute supports this interpretation: The Ethiopian Civil Code article which is delineated as a legislative source for article 1829 directly specifies that the

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[27] *See* La.Civ.Code art. 6 comment (d), 1987 Revision Comments. The legislative history of the 1984 amendments to the subrogation articles does not explain the motivation for the change in article 2161(3). The minutes of the House Committee Meeting report that Professor Saul Litvinoff of the Louisiana State Law Institute addressed the legislative committee and explained the changes in the subrogation laws. *House Committee on Civil Law and Procedure,* Minutes of Meeting on House Bill 250 by Representative Fernandez (April 24, 1984). In his independent writings, Professor Litvinoff does not describe article 1829(3) as affecting a change on this issue from article 2161(3) or from the partial subrogation rules. *See* Litvinoff, *supra,* 50 La.L.Rev. at 1181, 1182. Because the history of subrogation is consistent with the added specification in the new law, we find that this phrase in article 1829(3) remedies an ambiguity in article 2161(3) but does not reflect a substantive change in the law. The phrase therefore qualifies for retroactive application.

payment of a debt for which one is bound with others has the legal effect of entitling the payor to "indemnity or contribution *from his co-debtors*[.]"[28]

Our analysis of Louisiana subrogation law satisfies that SOPAC could not pursue a legal subrogation claim against Chabert successfully. This does not affect, however, our conclusion that a partial, conventional subrogation grants SOPAC this right. The rule SOPAC extracts from Sonnier and its progeny is derived solely from conventional subrogation. *Smith,* for example, defines the partial subrogee's right to recoup funds from the partial subrogor in conventional subrogation terms.[29] We hold that pursuant to the Smith and Turner interpretations of conventional subrogation, SOPAC has a conventional subrogation right against Chabert.

2. *Full Compensation*

Because Chabert has preference over the partial subrogation claim held by SOPAC,[30] SOPAC may not recoup its prior payments to Chabert unless Chabert has received full compensation for her loss. At trial, the burden of proof was on Chabert to demonstrate that the

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[28] *Civil Code of the Empire of Ethiopia Proclamation No. 165* of 1960 art. 1971 (Gazette Extraordinary 1960) (emphasis supplied).

[29] *See* 521 So.2d at 775 (citing *Sonnier* and La.Civ.Code art. 1826); *see also Brister,* 562 So.2d at 1046 (discussing *Smith* and *Sonnier*).

[30] *See Sonnier.*

$825,000 settlement did not fully compensate her total damages.[31]

The settlement agreement awarded $594,000 to Chabert and $115,500 to each of her children. Subtracting costs and attorney fees, the net compensation received by Chabert was $340,035. This figure is within the damage range estimated by one of the economists who testified at the bench trial. This expert calculated Chabert's past loss to be between $94,094 and $104,758 before taxes, and between $76,299 and $83,687 after taxes. Future loss was estimated at $239,187 to $291,000 before taxes, and $205,404 to $247,567 after taxes. The Louisiana Supreme Court has noted that the intermediate appellate courts are split on the issue of whether taxes are deducted from or included in damage awards; however, the court declined to resolve this issue.[32] Because a majority of Louisiana's circuit courts calculate gross rather than net earnings, we will assume that this is the appropriate measurement of damages.[33] The lowest post-tax estimate is $333,281. The district court appropriately could conclude, then, that the $340,035 net settlement fully compensated Chabert. This

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[31] *Wallace* (citing *Meyer v. State Department of Public Safety,* 312 So.2d 289 (La.1975)).

[32] *Martinez v. U.S. Fidelity and Guaranty Co.,* 423 So.2d 1088 (La.1982).

[33] *See Sorrells v. Eddie Knippers & Associates,* 544 So.2d 556 (La.App. 1st Cir.1989); *LeBleu v. Dynamic Industrial Constructors, Inc.,* 526 So.2d 1184 (La.App. 3d Cir.), *cert. denied,* 528 So.2d 154 (La.1988); *Harris v. Tenneco Oil Co.,* 563 So.2d 317 (La.App. 4th Cir.), *cert. denied,* 568 So.2d 1062 (La.1990); *Nolan v. Jefferson Downs, Inc.,* 592 So.2d 831 (La.App. 5th Cir.1991).

damage award is within the range of Louisiana's very conservative wrongful death awards.[34]

3. *Rule 408*

Chabert argues that the trial court committed reversible error by admitting evidence of communications between Chabert's counsel and SOPAC's counsel during the pendency of Chabert's state suit against the various tortfeasors. The admitted evidence reflected conversations and correspondence between counsel on the subjects of Chabert's potential for recover against the tortfeasors, whether SOPAC should participate in the litigation, and whether SOPAC would contribute to the cost of the litigation or reach an agreement regarding the subrogation owed. Chabert objected that the evidence was impermissible evidence of compromise negotiations admitted to prove validity or amount of a claim.[35]

We review evidentiary rulings only for abuse of discretion and will reverse a judgment on the basis of evidentiary rulings only if the challenged ruling affects a substantial right of the party.[36] A trial judge sitting without a jury is entitled to greater latitude in the admission or exclusion of evidence.[37] In a bench trial, reversal is

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[34] *See Thomas v. State Farm Insurance Co.*, 499 So.2d 562 (La.App.1986), *cert. denied*, 501 So.2d 213 (La.1987).

[35] Fed.R.Evid. 408.

[36] *Seidman v. American Airlines, Inc.*, 923 F.2d 1134 (5th Cir.1991).

[37] *Goodman v. Highlands Insurance Co.*, 607 F.2d 665, 668 (5th Cir.1979).

only warranted if all of the competent evidence is insufficient to support the judgment, or if it affirmatively appears that the incompetent evidence induced the court to make an essential finding which it otherwise would not have made.[38] We do not find that the challenged evidence was relevant to the trial court's findings regarding the existence and effect of a conventional subrogation. Therefore, even assuming that the court did err, any error would be harmless.[39]

4. *Attorney Fees*

Chabert counterclaimed against SOPAC to recover her cost of obtaining $132,000 of the $825,000 from the tortfeasors. The trial court estimated that cost to be $19,425.06. Chabert challenges this finding. We find no error and affirm.

When an employer pays compensation to a worker injured by the wrongful act of a third person, the employer and worker become co-owners of the right to recover damages from the third person.[40] If one pursues this right the other must proportionately contribute to the litigation expenses which are reasonable and necessary to obtain the recovery. Applying the *Moody* formula to the

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[38] *Id.; Figgs v. Quick Fill Corp.*, 766 F.2d 901 (5th Cir.1985).

[39] We do not hold that the district court erred; rather, we hold that if the court did err, the error was harmless because other competent evidence on the record is sufficient to uphold the district court's findings of fact and conclusions of law.

[40] *Moody v. Arabie*, 498 So.2d 1081 (La.1986).

present case SOPAC's proportionate interest in the recovery is calculated as follows:

$$\frac{\text{Employer's reimbursement}}{\text{Recovery from third person}} = \text{Employer's share of recovery}$$

$$\frac{\$132,000}{\$825,000} = 16\%$$

Because SOPAC has a 16% interest in the recovery, 16% of the expenses incurred in securing the recovery should be assessed to it. The district court did not calculate 16% of Chabert's 40% contingency fee. Instead, the court found that the reasonable total for Chabert's litigation expenses was the sum of $121,406.65. Chabert argues that the district court erred in this step in its *Moody* calculation.

We do not find the trial court's calculus to be reversible error. The costs of recovery are the necessary and reasonable expenditures and obligations incurred in effecting recovery.[41] The Rules of Professional Conduct detail the factors determining the reasonableness of an attorney's fees.[42] That a fee is contingent may be considered, but the court is not bound by this consideration alone.[43] The determination of a reasonable fee should be made on a case-by-case basis by the trial court.[44] The trial

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[41] *Moody*, 498 So.2d at 1086.

[42] *See* Rule 1.5, Rules of Professional Conduct adopted by the Supreme Court of Louisiana.

[43] *Moody*, 498 So.2d at 1086.

[44] *See Wood v. State Farm Mutual Automobile Insurance Co.*, 591 So.2d 1266 (La.App.1991) (40% contingency fee allowed

court is expressly charged with making an individual appraisal.[45] The trial court in the case at bar was free to appraise the reasonable cost of recovery based on the court's assessment of the effective use of counsel's time and effort in securing the settlement.

Conclusion

Because Chabert has been fully compensated by the $825,000 settlement, SOPAC may recover its $132,000 payment in accordance with the partial, conventional subrogation agreement. Further, we find no error in the district court's calculation of Chabert's expenses in recovering the settlement. The judgment of the district court is, therefore, AFFIRMED in all respects.

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because the court accepted it as reasonable in that case pursuant to the Rules of Professional Conduct); *Denton v. Cormier*, 556 So.2d 931, 937 (La.App.1990) (one-third contingency fee "reasonable under the circumstances"); *Jaffarzad v. Jones Truck Lines, Inc.*, 561 So.2d 144, 161 (La.App.), *cert. denied*, 565 So.2d 450 (La.1990) (one-third contingency fee reasonable); *Major v. Cotton's, Inc.*, 551 So.2d 57 (La.App.1989); *Samanie & Barnes v. Lawler*, 517 So.2d 340 (La.App.1987).

[45] *See Moody.*

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3256

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellee,

versus

EARLINE CHABERT,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(October 29, 1992)

Before POLITZ, Chief Judge, SMITH, Circuit Judge and FITZWATER,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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* District Judge of the Northern District of Texas, sitting by designation.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.